# STATE OF MICHIGAN

# COURT OF APPEALS

| | |
|---|---|
| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>February 8, 2007 |
| v | No. 265390<br>Oakland Circuit Court |
| MARLON SHAWN ALBERT,<br><br>Defendant-Appellant. | LC No. 05-201109-FH |

Before: Borrello, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of manufacturing 20 plants or more, but less than 200 plants, of marijuana, MCL 333.7401(2)(d)(ii). Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to 2 to 15 years' imprisonment. Defendant appeals as of right. For the reasons set forth in this opinion we affirm the conviction and sentence of defendant. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first contends that the trial court erred when it refused to instruct the jury regarding his theory of the case. This Court reviews claims of instructional error de novo. *People v Martin*, 271 Mich App 280, 337; 721 NW2d 815 (2006).

In reviewing a claim of instructional error, this Court examines the instructions as a whole, and, even if there are some imperfections, there is no basis for reversal if the instructions adequately protected the defendant's rights by fairly presenting to the jury the issues to be tried. *Martin*, *supra* at 337-338. Generally, a trial court is required to instruct the jury in the applicable law and fully and fairly present the case to the jury in an understandable manner. Jury instructions are crafted to permit the fact-finder to correctly and intelligently decide the case. *People v McDaniel*, 256 Mich App 165, 169-170; 662 NW2d 101 (2003), rev'd in part on other grounds *People v Francisco*, 474 Mich 82 (2006). Thus, they should include not only all the elements of the charged offense, but also material issues, defenses, and theories which are supported by the evidence. *McDaniel*, *supra* at 169-170. The trial court is required to give a defendant's requested instruction when the instruction concerns his theory and is supported by the evidence. If a requested instruction was not given, the defendant bears the burden of establishing that the trial court's failure to give the instruction constituted a miscarriage of justice. *McDaniel*, *supra* at 169-170.

When defense counsel was asked whether he was satisfied with the jury instructions, he indicated that he wanted to approach the bench. At a side bar, defense counsel requested that the court instruct the jury regarding defendant's theory of the case. The trial court denied the request. Although the side bar conversation was not transcribed, defense counsel repeated the theory of the case in open court for benefit of the record. Defendant's theory of the case was as follows: "the defendant states that he was present as a guest on the premises where the Marijuana was found and that he had no possession or dominion over the plants. There is no [nexus] between him and the drugs found."

During his closing argument, defense counsel told the jury that defendant was a mere guest at the house in question and the marijuana operation was not his. With regard to the jury instructions, the court instructed the jury as follows:

> It is alleged in this case that the defendant manufactured Marijuana by growing Marijuana plants. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt. First that the defendant manufactured a controlled substance; second that the substance manufactured was Marijuana; third that the defendant knew he was manufacturing Marijuana and fourth, there were between 20 and 200 Marijuana plants.
>
> * * *
>
> *Even if the defendant knew that the alleged crime was planned or being committed, the mere fact that he or she was present when it was committed is not enough to prove that he or she assisted in committing it.* [Emphasis added.]

Although the court did not instruct the jury concerning defendant's theory of the case, the basic thrust of the theory was nonetheless conveyed by the instructions. The instructions conveyed the "mere presence" concept – that defendant's mere presence near drugs is not enough to find him guilty of the charged offense. The instructions fairly presented to the jury the issues to be tried by enumerating the elements of the offense and informing the jury about the "mere presence" defense. Even if somewhat imperfect, jury instructions do not create error if they fairly present the issues to be tried and sufficiently protect the defendant's rights. *McDaniel*, *supra* at 170.

Moreover, for defendant to prevail in his quest for reversal of his conviction, he must not only show that the trial court erred in refusing to give his theory of the case, but also, that the trial court's failure constituted a miscarriage of justice. Defendant cannot make such a showing in light of the fact that the instructions fairly presented the issues, including defendant's defense of mere presence. Hence, since the trial court's failure to give defendant's theory of the case did not result in a miscarriage of justice, a reversal of defendant's conviction is unwarranted.

Second, defendant contends that the trial court erred in denying his motion to quash and his motion to suppress.

When reviewing a district court's decision to bind over a defendant for trial, the circuit court must consider the entire record of the preliminary examination. *People v Orzame*, 224 Mich App 551, 557; 570 NW2d 118 (1997). The circuit court may not substitute its judgment

for that of the magistrate, and reversal is appropriate only if it appears on the record that the district court abused its discretion. This Court reviews the circuit court's decision de novo to determine whether the district court abused its discretion. *Orzame*, *supra* at 557.

The district court must bind the defendant over for trial if, at the conclusion of the preliminary examination, the district court finds probable cause to believe that the defendant committed the crime. Probable cause exists where the court finds a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious person to believe that the accused is guilty of the offense charged. *Orzame*, *supra* at 558.

Here, defendant is charged with manufacturing 20 plants or more, but less than 200 plants, of marijuana, MCL 333.7401(2)(d)(ii). The elements of unlawful manufacture of marijuana are: (1) defendant manufactured a controlled substance, (2) the manufactured substance was marijuana, and (3) defendant knew that he was manufacturing marijuana. MCL 333.7401(2)(d)(ii). Testimony adduced at the preliminary examination reveals that Officer Antonio Proulx and a few other officers were dispatched to the house in question to investigate a 911 hang up call. Proulx knocked on the door of the house and saw defendant through a window. The officer explained to defendant that he was responding to a 911 hang up call and wanted to check inside the residence to make sure no one was in danger. Defendant refused the officer's request. After it was determined that (1) the car in the driveway was registered to a female, and (2) the police were called to the house one month earlier because of a PPO violation, the officers forced their way inside the house to check for the possibility of individuals in danger. Once inside, Proulx asked defendant for his name, but defendant refused to speak to the officer. One of the officers searched the basement and marijuana plants and an extensive marijuana growing operation were found. Also found in the basement were a man's coat containing a key to the basement, a framed picture of defendant, and two receipts with defendant's name on them. Given the testimony concerning a marijuana growing operation in the basement and defendant's connection to the basement via various articles, there was probable cause to believe that defendant was involved in manufacturing marijuana. Therefore, the trial court did not err in denying defendant's motion to quash.

Next, defendant argues that the trial court erred in denying his motion to suppress given that the warrantless search of the house in question is unlawful. Factual findings made in conjunction with a motion to suppress are reviewed for clear error. *People v Stevens (After Remand)*, 460 Mich 626, 631; 597 NW2d 53 (1999). However, to the extent that the trial court's decision is based upon issues of law, appellate review is de novo. *People v Kaslowski*, 239 Mich App 320, 323; 608 NW2d 539 (2000). Constitutional questions are reviewed de novo. *People v Pitts*, 222 Mich App 260, 263; 564 NW2d 93 (1997). Both the United States and Michigan Constitutions guarantee the right against unreasonable searches and seizures. *People v Beuschlein*, 245 Mich App 744, 749; 630 NW2d 921 (2001). The lawfulness of a search or seizure depends upon its reasonableness. Generally, a search conducted without a warrant is unreasonable unless it was conducted pursuant to an established exception to the warrant requirement. *Beuschlein*, *supra* at 749. Under the emergency aid exception to the search warrant requirement, an officer may enter a dwelling without a warrant if he reasonably believes that a person inside needs immediate aid. *Beuschlein*, *supra* at 756. He must possess specific and articulable facts which merit that conclusion, and the officer may do no more than is reasonably necessary to determine whether a person needs assistance and to provide that

assistance. *Beuschlein*, *supra* at 756. Unlike the other exceptions to the warrant requirement, when entering a constitutionally protected area pursuant to the emergency aid or community caretaker exceptions, police officers are not required to have the probable cause traditionally required in searches for evidence. *People v Davis*, 442 Mich 1, 11-12; 497 NW2d 910 (1993).

Testimony at the suppression hearing revealed that a 911 hang up call was placed from the house in question. Lieutenant Brian Czajkowski called the number back, but no one answered. Officers were dispatched to the house in the event that someone in the house was in danger and needed help. Defendant was in the house and refused to answer the door or let the officers in. Before the officers forced their way inside the house, it was determined that a female's voice was on the answering machine message, a female's car was parked in the driveway, and a month earlier a female from that house called the police to report a PPO violation. The following factors, taken together, led the officers to reasonably believe that there might have been a person inside who required immediate aid: (1) someone from the residence called 911 and hung up the phone; (2) no one answered the phone when the officer called back; (3) police were called to the same house a month earlier to investigate a PPO violation occurring at the house; (4) defendant was uncooperative when the officers arrived at the house as he refused to answer any questions, speak to the officers or let them in; (5) the car in the driveway was registered to a female and the voice on the answering machine was a female's. Given these factors, it was reasonable for officers to believe that someone inside the house, perhaps the female whose vehicle was parked outside and who called the police about a PPO violation, needed assistance. Therefore, the warrantless search of the house was proper pursuant to the emergency aid exception. Once inside, officers observed marijuana plants in plain view. After this discovery, officers obtained a search warrant before further searching the area.

Furthermore, the prosecution asserts that the search was lawful not only under the emergency aid exception, but also pursuant to the community caretaking exception. The police perform a variety of functions that are separate from their duties to investigate and solve crimes. *Davis*, *supra* at 20. These duties are sometimes categorized under the heading of "community caretaking" or "police caretaking" functions. *Davis*, *supra* at 20. When police, while performing one of these functions, enter into a protected area and discover evidence of a crime, this evidence is often admissible. *Davis*, *supra* at 20. To the extent that the officers were not searching for evidence of any crime, but rather were acting in a caretaking capacity, the search is also proper under the community caretaking exception. *Davis*, *supra* at 20.

It should be noted that in upholding the legality of the search, the trial court indicated that the exigent circumstances exception to the warrant requirement applied. Under the exigent circumstances exception to the search warrant requirement, police may enter a dwelling without a warrant if the officers possess probable cause to believe that a crime was recently committed on the premises, and probable cause to believe that the premises contains evidence or perpetrators of the suspected crime. *Beuschlein*, *supra* at 749-750. Neither the community caretaking nor the emergency aid exceptions should be confused with the exigent circumstances exception, which applies to searches for evidence or perpetrators of a crime. *Davis*, *supra* at 24-25. The officers did not have probable cause to believe that a crime was recently committed on the premises or that the premises contained evidence or perpetrators of the suspected crime. However, because the emergency aid exception applies, as discussed *infra*, the trial court nevertheless reached the right result. Where a trial court reaches the correct result for the wrong

reason, its decision need not be reversed on appeal. *People v Jory*, 443 Mich 403, 425; 505 NW2d 228 (1993). Accordingly, the trial court's denial of defendant's motion to suppress was supported by the evidence.

Affirmed.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Jessica R. Cooper